IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-351

ATASCADERO STATE HOSPITAL and
CALIFORNIA DEPARTMENT OF MENTAL HEALTH, petitioners,

v.

DOUGLAS JAMES SCANLON, respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Do Sections 504 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 794 and 794a, which authorize suit and the award of monetary and equitable relief as well as the award of attorney's fees to a prevailing party against any recipient of federal financial assistance by any person aggrieved by the acts or omissions of such recipient, and which require remedial action for the violation of Section 504's terms, abrogate the State of California's Eleventh Amendment immunity when California, as one of the principal intended recipients of federal financial assistance, violates the Act?

2. Has the State of California consented to be sued and waived its Eleventh Amendment immunity through recipt of federal financial assistance with assurances that it will obey the commands of the Rehabilitation Act and that it will take corrective remedial action for past violations of the Act?

3. Does the Eleventh Amendment operate as a bar to the Rehabilitation Act when the Rehabilitation Act was enacted pursuant to Section 5 of the Fourteenth Amendment and Article 1, Section 8 of the United States Constitution?

4. Should the decision in Hans v. Louisianna, 134 U.S. 1 (1890), be overruled? At the very least, should the decision in Edelman v. Jordan, 415 U.S. 651 (1974), be overruled?

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Respondent Douglas James Scanlon opposes the petition for writ of certiorari filed by Atascadero State Hospital and the California Department of Mental Health. The petition should be denied inasmuch as the constitutional issues presented are premature, can be framed more concretely, or avoided entirely through further litigation in this matter. The decision of the Court of Appeals is correct making review of this matter not significant.

OPINIONS BELOW

The opinion of the Court of Appeal for the Ninth Circuit is reported at 735 F.2d 359. Prior decisions of the Ninth Circuit and this Court in this action can be found at 677 F.2d 1271, vac'd and remanded, 104 S.Ct. 1583 (1984).

ADDITIONAL CONSTITUTIONAL PROVISIONS

1. The Fourteenth Amendment to the United States Constitution in relevant part provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. Article 1, Section 8, Clause 1 of the United States Constitution provides:

> Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

STATEMENT OF CASE

Respondent Douglas James Scanlon has diabetes mellitus which caused loss of vision in one eye. During the Spring of 1977, while Scanlon was a graduate student at California Polytechnic Institute at San Luis Obispo, Scanlon applied for a position at Atascadero State Hospital as a graduate student assistant. Scanlon was offered the position subject to passing a pre-employment physical which he failed solely by reason of his handicaps -- namely, diabetes and loss of vision in one eye. As a result of failing the physical, Scanlon was denied the position.

Atascadero State Hospital and the California State Department of Mental Health, the state agency responsible for administering and supervising Atascadero, are recipients of federal financial assistance. Prior to commencing this action in November of 1979, Scanlon filed an administrative complaint with the then U.S. Department of Health, Education and Welfare (HEW). In May of 1979, HEW determined that the petitioners had discriminated against Scanlon solely by reason of his handicap.

After suit was commenced, petitioners moved to dismiss the complaint on two grounds. First, they contended that § 504 of the Rehabilitation Act did not protect a qualified handicapped person against employment discrimination unless the Federal assistance was received for the purpose of providing employment. Second, the petitioners argued that Mr. Scanlon's suit under § 504 was barred by the Eleventh Amendment to the United States Constitution.

The District Court rejected petitioners' interpretation of § 504, namely that federal financial assistance had to be received for employment purposes before a claim of employment discrimination could be made out. Nonetheless, the District Court granted the petitioners' motion to dismiss the § 504 action and pendant state claims on the ground that the entire action was barred by the Eleventh Amendment.

In a divided opinion the Court of Appeals for the Ninth Circuit summarily affirmed. Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (1982). However, the majority did not reach the Eleventh Amendment issue, but rather affirmed the dismissal on the ground that a private action

under § 504 to redress employment discrimination cannot be maintained unless a primary objective of the federal assistance is to provide employment.

Scanlon filed a petition for writ of certiorari with this Court which this Court granted, then vacated the decision of the Court of Appeals and remanded. ___ U.S. ___, 104 S.Ct. 1583 (1984). Following remand, the Court of Appeal reconsidered its decision in light of Consolidated Rail Corp. v. Darrone, _____ U.S. ____, 104 S.Ct. 1248 (1984), and reversed the decision of the District Court. The Court of Appeals concluded that under Darrone, handicapped persons denied employment can sue recipients of federal financial assistance regardless of whether the recipients received federal financial assistance for the purpose of employment. The Court of Appeals also concluded that the Rehabilitation Act of 1973, as amended, abrogated the State of California's Eleventh Amendment immunity, that the state had consented to be sued and waived its immunity. This writ concerns solely that part of the Court of Appeals' decision that touches upon the Eleventh Amendment.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT WARRANT REVIEW BY THIS COURT AS A MATTER OF SIGNIFICANT PUBLIC IMPORTANCE.

In its effort to have the Court prematurely adjudicate constitutional issues, petitioners ignore that the interlocutory ruling of the Court of Appeals has created no liability against the State and has established no enforceable rights against it. Rather, the ruling has

merely allowed the litigation to proceed in its normal course. The ruling creates no guarantee that respondent will prevail or that he will be awarded monetary or equitable relief against California. It goes without saying that the Court avoids unnecessary and premature constitutional decision making. This is particularly true where an act of Congress is called into question. This lawsuit should be no exception to this rule. The posture of this litigation reveals that it is not yet mature for adjudication of the Eleventh Amendment issue and that maturation of the record will enhance the ability of the Court to render a sound decision should one prove necessary.

A. The only pleadings filed to date are the complaint and a motion to dismiss. Critical discovery that may avoid the necessity for constitutional adjudication is yet to occur.

The record is silent as to the amount of federal financial assistance petitioners receive and which programs and activities of petitioners receive such assistance. These as of yet unanswered questions may prove to be critical inquiries before liability can be imposed under the Rehabilitation Act of 1973, 29 U.S.C. § 794, for it may be that no relevant program or activity of petitioners receives federal financial assistance. Recently, under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 16781 et seq., which is similar in language to the Rehabilitation Act of 1973, 29 U.S.C. § 794, here at issue, this Court held that Title IX's nondiscrimination proscriptions do not operate against an entire institution if only a discrete program or activity of the institution received federal

financial assistance. Grove City College v. Bell, ____ U.S. ____, 104 S.Ct. 1211 (1984). At present it is unclear whether this reasoning applies to the Rehabilitation Act. Consolidated Rail Corp. v. Darrone, ____ U.S. ____, 104 S.Ct. 1248, 1256 (1984). Should future litigation conclude that the reasoning of Grove City College applies to the Rehabilitation Act and should it develop that Scanlon was not discriminated against in any relevant program or activity to which the nondiscrimination proscriptions of the Act apply, then no liability against the State will be established in this litigation. Thus potentially unnecessary constitutional decision making can be avoided if the litigation is allowed to follow its normal course and if the development of the law is allowed to unfold.

In like fashion, the record is silent as to whether Scanlon is "otherwise qualified" for the position he applied for, 29 U.S.C. § 794, and whether petitioners would have had to make fundamental alterations in the job to accommodate him. Unless Scanlon overcomes these hurdles he may be entitled to no relief. Southeastern Community College v. Davis, 442 U.S. 397 (1979).

Finally, the record is silent about whether petitioners intentionally discriminated against Scanlon. Since it is not yet clear whether intentional discrimination is required before liability under the Rehabilitation Act can be established, it is premature for the Court to rush into constitutional adjudication when liability has not yet been established and may not be. Compare, Consolidated Rail Corp. v. Darrone, supra, with Guardians Ass'n v. Civil Service Comm'n of the City of N.Y., ____ U.S. ____, 103 S.Ct. 3221 (1983); see, also, Alexander v. Choate, sub nom.

Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983), cert. granted, 79 L.Ed. 2d 677 (1983) [argued October 1, 1984].

The ruling below creates no actual liability against California. Nor does the ruling guarantee that Scanlon will prevail. This Court should allow the litigation to continue its normal course. By following such a path the Court will allow the record to be clarified and the Court will allow the jurisprudence of the Rehabilitation Act to develop fully. By following such a path, this Court can potentially avoid unnecessary constitutional decision making.

B. The decision of the Court of Appeals is correct. Through the Rehabilitation Act of 1973, as amended, Congress abrogated California's Eleventh Amendment immunity. Moreover, California has consented to be sued and has waived any Eleventh Amendment shield it may have had.

The Court of Appeals is correct that in enacting the Rehabilitation Act Congress abrogated California's Eleventh Amendment immunity. Undeniably any disabled person aggrieved by an act of discrimination solely by reason of his handicap can sue any recipient of federal financial assistance, including a state. The position advanced by California is not only wrong but it places California at war with itself and with Congress.

Until this litigation California advocated that the Rehabilitation Act allowed the victims of handicap

discrimination to sue states and their agencies. In Southeastern Community College v. Davis, 442 U.S. 397 (1979), the State of California filed the only state brief in support of Davis' right to sue a state operated college. California's amicus curiae brief in Davis forthrightly states that:

> It is clear that a private right of action under Section 504 has always been contemplated by Congress.

Brief of California as Amicus Curiae in Southeastern Community College v. Davis, at 18.

California's Davis brief looked to the legislative history of the Rehabilitation Act to reach its conclusion. The brief quoted from the Senate Report on the 1974 amendments to the Act which stated:

> This approach to implementation of Section 504, which closely follows the models of the above cited anti-discrimination provisions, [Title VI] would ensure administrative due process ... as well as relative ease in implementation, and permit a judicial remedy through a private action.

Id. at 20-21 (emphasis added by California) quoting from 1974 U.S. Code, Cong. & Admin. News, at pp. 6390-6391.

In arguing for a private right to sue a state, California noted:

> The 95th Congress has further strengthened the right to a private judicial remedy under Section 504 and continued to act in a manner consistent with the above quoted remarks. The 1978 amendments to the Act, especially the addition of Section 505(b) which empowers the courts to ... allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs ... can only be read to mean that implicit within Section 504 is the right of an aggrieved person to seek judicial redress.

Ibid. at 21.

Admittedly, Davis did not deal directly with the Eleventh Amendment immunity of Southeastern Community

College. However, it could not have escaped California's attention that the college was a state institution run by North Carolina and that by urging that Davis be allowed to sue the college, California was unequivocably recognizing that the Eleventh Amendment did not act as a bar to suits brought to enforce the Rehabilitation Act. If an aggrieved handicapped person can sue the State of North Carolina, why can't an aggrieved California resident sue California, particularly where, as here, the U.S. Department of Health, Education and Welfare (now the United States Department of Health and Human Services) has found that California impermissibly discriminated against Scanlon solely by reason of his handicap? Nothing in the petition of California comes close to answering this stunning anomaly.

The conclusion reached by California in its Davis brief is unquestionably correct. When Congress amended the Rehabilitation Act in 1978 to add attorneys fees to the remedies available to prevailing parties, it squarely focused on the Eleventh Amendment immunity of the states. Senator Alan Cranston, ironically also from California, was one of the chief sponsors of the amendments. Senator Cranston stated:

> I emphasize that it is intended that interpretation of the attorney's fees provision in the committee bill be analogous to interpretations of the Civil Rights Attorney's Fees Act of 1976, Public Law 904-556. The legislative history and expressions of legislative intent with respect to Public Law 94-556 are applicable to the new section 505(b). Thus, for example, the discussion of "prevailing party" and "reasonable fees" found in the Senate committee report to accompany H.R. 15460 (H.Rept. No. 94-1558), in particular pages 6 to 9, would be applicable whenever there is judicial consideration of the handicapped attorney's fees provision contained in proposed section 505(b).
>
> Mr. President, there are a number of points I would like to highlight. I stress that I raise these particular points solely for the

> purpose of highlighting them and in no way intend to imply that other pertinent points not mentioned are not applicable.
>
> * * *
>
> Third, with respect to State and local bodies or State and local officials, attorney's fees, similar to other items of cost, would be collected from the official, in his official capacity from funds of his or her agency or under his or her control; or from the State or local government -- regardless of whether such agency or Government is a named party. The authorization of attorney's fees under proposed section 505(b) in cases brought to Congress under among other things, section 5 of the 14th amendment. Thus, in accordance with the Supreme Court's decision in Hutto v. Finney, No. 77-1660, June 23, 1978, the 11th amendment is no bar to the recovery of attorney's fees under proposed section 505(b) from State government as a result of an action or proceeding to enforce or change a violation under title V of the Rehabilitation Act of 1973.
>
> Fourth, proposed section 505(b) is intended to apply to all cases pending on the date of enactment of the provision.

124 Cong. Rec. 30346-47 (remarks of Sen. Cranston, Sept. 20, 1978) (emphasis added).

Senator Cranston's reliance on Hutto v. Finney, 437 U.S. 678 (1978), bears note. In Hutto v. Finney, the Court looked to language virtually identical to that of Section 505 but contained in the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, and to the almost identical Congressional statements to find that the Eleventh Amendment had been abrogated by Congress.

The Rehabilitation Act is a particularly strong Act to find congressional abrogation of the Eleventh Amendment. States are the prime recipients of federal financial assistance to which the Act applies. They are included within the definition of recipients. 45 C.F.R. § 84.2(f). Section 505 of the Act, 29 U.S.C. § 794a, not only allows for attorney's fees to be awarded "in any action" to enforce

the Act, but it also makes available to any person the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq., in any action brought to enforce the Act. The language of the Act is unequivocable and contemplates no exception. Hutto v. Finney, supra, 437 U.S. at 693-94. As the Court of Appeal correctly noted quoting from Edelman v. Jordan, 415 U.S. 651, 672 (1974), the Rehabilitation Act is a "congressional enactment [that] ... by its very terms authorize[s] suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities." Scanlon v. Atascadero State Hospital, 735 F.2d 359, 361 (9th Cir. 1984).

Regulations that implement the Rehabilitation Act are consistent with the conclusion that states by accepting federal financial assistance consent to suit and agree to waive their Eleventh Amendment immunity. Regulations issued by HEW require states to assure that they will obey the Rehabilitation Act. 45 C.F.R. § 84.5. The regulations do not stop at mere assurances. They require states to take remedial action to overcome past acts of discrimination. 45 C.F.R. § 84.6; see, also, 45 C.F.R. § 84, App. 1 ¶ 9 (analysis of remedial action regulation). Even prior to the strengthening of the Act through section 505, the regulations noted that it was likely that recipients of federal financial assistance could be sued through a private action. 45 C.F.R. § 84, App. 1 ¶ 8 (analysis of private right of action).

These regulations and analyses were before Congress prior to when the Rehabilitation Act was strengthened to increase its remedies and to provide for attorneys fees to be paid to the victims of discrimination. Implementation

of Section 504, Rehabilitation Act of 1973: Hearings Before the House Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess. 73, 76 (1977).

When read together these regulations, which warrant considerable deference because they were issued after consultation with the Congress, Consolidated Rail Corp. v. Darrone, supra, 104 S.Ct at 1255, establish that all recipients, states included, make themselves fully accountable to the victims of discrimination when they receive federal financial assistance and that by agreeing to the receipt of such assistance all recipients agree to be bound without limitation to remedy their discriminatory acts or omissions.

The decisions cited by California in support of its petition do not change the result. Edelman v. Jordan, supra, itself recognizes that federal statutes do not always have to state expressly that the Eleventh Amendment is waived. As California's amicus curiae brief in Davis illustrates, the Rehabilitation Act breathes right of private enforcement against the states at every relevant passage. Moreover, Edelman, Quern v. Jordan, 440 U.S. 332 (1979), and Florida Dep't of Health v. Florida Nursing Homes Ass'n, 450 U.S. 147 (1981), all involved laws passed exclusively pursuant to Article 1, Section 8 of the United States Constitution (spending clause). The Rehabilitation Act was passed pursuant to the Fourteenth Amendment as well as the Spending Clause. This Court has recognized that the Fourteenth Amendment to the United States Constitution has eroded Eleventh Amendment immunity and that laws passed pursuant to Section 5 of the Fourteenth Amendment survive

Eleventh Amendment challenges. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

Additionally, in the Edelman line of cases cited by California, Congress did not provide expressly or impliedly for private enforcement of the Acts involved, leaving the Court to decide whether the Civil Rights Act of 1871, 42 U.S.C. § 1983, abrogated Eleventh Amendment immunity. See, e.g., Quern v. Jordan, supra, 440 U.S. at 342-44. In contrast, as California noted in its Davis amicus curiae brief, the Rehabilitation Act expressly contemplates private enforcement as is clear from the language of Section 505, 29 U.S.C. § 794a, and its relevant congressional history.

Finally, the holding in Employees v. Missouri Public Health Dep't, 411 U.S. 279 (1973), a pre-Edelman decision, does not counsel a different result. Unlike Employees, where there was no Congressional history concerning the waiver of Eleventh Amendment immunity, 411 U.S. at 285, here there is such a history. 124 Cong. Rec. 30346-30349 (Remarks of Sen. Cranston and Bayh, September 20, 1978).

Only by ignoring its own prior conclusions about the Rehabilitation Act as well as the language, structure, purpose and legislative history of the Act, does California challenge the decision of the Court of Appeals. Unquestionably the decision of the Court of Appeals is correct. The decision does not warrant review by this Court.

II.

SHOULD THIS COURT ACCEPT THE PETITION FOR WRIT OF CERTIORARI, IT SHOULD CONSIDER OVERRULING THE DECISION IN HANS V. LOUISIANA. AT THE VERY LEAST, THE DECISION IN EDELMAN V. JORDAN SHOULD BE OVERTURNED.

In recent years considerable attention has been focused on the meaning of the Eleventh Amendment. Since Hans v. Louisiana, 134 U.S. 1 (1890), this Court has concluded that despite the Amendment's otherwise unambiguous language, the Eleventh Amendment bars all suits in federal court whether filed by a citizen against another state or against his own state. However, time has not stood still. Persuasive scholarship now casts doubt on the soundness of the ruling in Hans v. Louisiana. See, generally, Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Col. L. Rev. 1889 (1983) (hereinafter Eleventh Amendment: Reinterpretation); Jacobs, The Eleventh Amendment and Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515 (1978); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L.Rev. 1203 (1978). As detailed by Judge Gibbons in Eleventh Amendment: Reinterpretation, and by the other scholars, the reason for the Eleventh Amendment, its wording and structure as well as contemporaneous judicial interpretation, all lead to the conclusion that Hans v. Louisiana was wrongly decided.

Respondent does not lightly request this Court to overrule Hans v. Louisiana. A decision whose life has been sustained for so long a time should not be cast aside capriciously. However, neither should it be falsely revered. As this Court indicated in Monell v. New York City

Dept. of Social Services, 436 U.S. 658, 695-701 (1978), when historical research reveals that decisions of the Court are wrong, the Court should forthrightly admit the mistake and correct the error.

As the volume of cases that invoke the Hans holding grows, so does confusion as to the fundamental meaning and requirements of the Eleventh Amendment. Hans v. Louisiana establishes a rule of legislative enactment that unduly protects the states while unnecessarily infringing upon the right of the people to hold states accountable for their discriminatory acts and the power of the Congress to legislate pursuant to Article 1, Section 8, and to the Fourteenth Amendment. Hans fails to come to grips with the fundamental alteration of states' rights wrought by the Fourteenth Amendment.

Regardless of whether the policy espoused in Hans v. Louisiana is defensible in abstract theory, the policy needs to be grounded in a sound and constitutionally valid interpretation of the Eleventh Amendment that does not do violence to the logical commands of the Amendment, the reasons why it was passed, and the history of the Fourteenth Amendment. Hans does such violence.

For like reasons the Court should overrule Edelman v. Jordan. Edelman rests on a foundation laid by Hans v. Louisiana that cannot withstand historical scrutiny. Central to the holding in Edelman was the conclusion that laws passed to enforce the Fourteenth Amendment specifically had to mention that they overruled Eleventh Amendment immunity, that the Fourteenth Amendment did not remove such immunity by its own force, and that since the Congressional debates that surrounded the passage of such historic civil

rights laws as the Civil Rights Act of 1871, 42 U.S.C. § 1983, failed to mention abrogation of Eleventh Amendment immunity, the immunity was not diminished. Quern v. Jordan, 440 U.S. 332, 342-344 (1979). This rationale fails at several key junctures. If the common, mid-Nineteenth Century understanding of the Eleventh Amendment was not as Edelman states, but rather, if it were more in line with the express language of the Amendment as scholars now agree, then Congressional failure in 1871 to mention abrogation of immunity during civil rights debates becomes insignificant. Likewise, if the Fourteenth Amendment was thought to fundamentally realign and curtail states' rights, including immunity if any existed, then laws passed pursuant to its Section 5 would not need to invoke talismanic phrases of abrogation. The Fourteenth Amendment had already performed the task.

Edelman v. Jordan and its progeny serve to erode impermissably the Fourteenth Amendment. They unduly restrict the people and the Congress and impose artificial hurdles to statutes geared to further civil rights. Edelman should be overruled.

CONCLUSION

For the foregoing reasons the Court should deny the petition for writ of certiorari filed by the State of California.

Dated: November 2, 1984

Respectfully submitted,

WESTERN LAW CENTER FOR
THE HANDICAPPED
AT LOYOLA LAW SCHOOL

Joseph Lawrence

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Attorneys for Respondent

Respondent gratefully acknowledges the assistance of Sang Hyun Kang, Sung Y. Kim, Jeffrey LeBeau, Stephen Olsen, and Robert Olson, law students at Loyola Law School, Los Angeles, California, in helping to prepare this brief in opposition to the petition for writ of certiorari.

CERTIFICATE OF SERVICE

PURSUANT TO SUPREME COURT RULE 28.5(b)

I am a member of the Bar of the United States Supreme Court, am one of the attorneys representing Douglas James Scanlon, the respondent in Docket No. 84-351, and I am filing a notice of appearance in this matter in connection with respondent's opposition to the petition for writ of certiorari.

I served the petitioner herein by placing the following in a United States mail box, with first-class postage prepaid, the following documents:

One copy of the application for leave to proceed in forma pauperis with supporting affidavit

Three copies of respondent's brief in opposition to the petition for certiorari

addressed to counsel of record as follows

James E. Ryan, Esq.
Deputy Attorney General
3580 Wilshire Boulevard, 8th floor
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on this third day of November, 1984. I swear under penalty of perjury that the foregoing is true and correct. Executed this third day of November, 1984, in the County of Los Angeles, State of California.

Marilyn Holle
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